UNITED STATES OF AMERICA
BEFORE THE FEDERAL COMMUNICATIONS COMMISSION

In the Matter of Notice of Proposed Rulemaking Regarding Possible Amendment of Rules Implementing the Telephone Consumer Protection Act	:	CG Docket No.02-278 CC Docket No. 92-90

COMMENTS OF THE ELECTRONIC RETAILING ASSOCIATION REGARDING THE COMMISSION'S NOTICE OF PROPOSED RULEMAKING REGARDING POSSIBLE AMENDMENTS TO RULES IMPLEMENTING THE TELEPHONE CONSUMER PROTECTION ACT

I. Introduction

The Electronic Retailing Association ("ERA") is the leading trade association representing the electronic retailing industry. Its mission is to foster the use of various forms of electronic media – television, Internet, telephone, radio – to promote goods and services to consumers. The ERA has over four hundred fifty (450) member organizations encompassing a wide range of entities, such as advertising agencies, direct response marketers, telemarketers, Internet and "brick and mortar" retailers, fulfillment service providers and television shopping channels.

The ERA is submitting these comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM"), 67 F.R. 62667 (October 8, 2002), in which it requested comment on whether to revise, clarify or adopt any additional rules in order to more effectively carry out Congress's directives in the Telephone Consumer Protection Act of 1991 ("TCPA"), 47 U.S.C. § 227. In particular, the ERA is providing comment with respect to whether the Commission should reconsider its previous determination not to adopt a national do not call ("DNC") list as authorized under the TCPA in light, at

least in part, of the Federal Trade Commission's ("FTC") proposal earlier this year to adopt its own national DNC list for those entities subject to its jurisdiction.

II. Executive Summary

The ERA believes that the company-specific DNC list requirements found in the Commission's current rule implementing the TCPA (the "Current TCPA Rule") strike the proper balance between the desire of consumers to prevent unwanted telephone solicitations and the needs of business to contact their existing and potential customers. A national DNC list is unnecessary and would be more restrictive of telemarketers' ability to communicate with actual and potential customers than is required to protect the privacy interests of consumers.

We further believe that any comment on the possible coordination of efforts between the Commission and the FTC in connection with the adoption of a national DNC list is premature. The FTC has not yet promulgated final rules calling for the creation of such a national list and has provided only the barest details regarding how such a list would be operated. As such, we would respectfully request the opportunity to comment further on this issue at such time as the FTC adopts final rules relating to a national DNC list.

Nevertheless, in the event that the Commission determines that a national DNC list should be implemented, we believe that either preemption of, or harmonization with, state DNC lists is required. Moreover, the ERA believes that any national DNC list must contain an exemption for calls placed to consumers with whom the seller has an established business relationship.

Finally, the ERA does not believe that the Commission should impose a mandatory abandonment rate on calls placed via predictive dialer devices that is below the current industry standard of five percent (5%). A mandatory abandonment rate below five percent (5%) would disproportionately harm telemarketers in comparison to the purported benefits provided to consumers.

III. The Current Company-Specific DNC List Scheme Remains the Most Efficient and Effective Means of Balancing the Needs of Consumers and Telemarketers

In its original TCPA rulemaking, the Commission concluded that the company-specific DNC list was the most efficient and effective means to permit consumers to avoid unwanted telephone solicitations. See In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 7 F.C.C.R. 8752 (1992) (hereinafter, the "TCPA Rules and Regulations"). In our view, this conclusion remains valid today.

As noted by the Commission, the company-specific approach provides a number of advantages to both consumers and businesses. For consumers, it allows them the freedom of choice to "opt out" of receiving calls from businesses from whom they do not wish to receive future solicitations, without giving up the right to continue to receive telephone solicitations from those companies whose products or services may be of interest. Moreover, even with respect to businesses with which the consumer has an established business relationship, the consumer is still free to discontinue the relationship and cease any further calls upon request to that business.[1] TCPA Rules and Regulations, 7 F.C.C.R. 8752.

[1] In addition, in the event that a particular consumer seeks to more broadly limit the number of telemarketing calls received, the Direct Marketing Association's ("DMA") Telephone Preference Service ("TPS") already provides the consumer with a mechanism to do so. The TPS has been

Telemarketers benefit from the company-specific scheme as well. The current company-specific DNC regime has been in place since 1992 and the internal mechanisms and procedures required to comply with these requirements are already in place. As a result, the cost of continued compliance with the company-specific requirement would be significantly less onerous for marketers than compliance with any national DNC list. As noted in the NPRM, the TCPA prohibits the Commission from charging consumers for inclusion on any national DNC list that it might adopt. NPRM, 67 F.R. at 62676. Instead, the costs of administering and maintaining the national list would be borne, in the first instance, by the telemarketers. Id. The ERA believes such a result would be inequitable and burdensome to telemarketers in light of the anticipated high cost of establishing and administering a national DNC list and the significantly less onerous alternative already in place under the current company-specific DNC list model.[2]

Moreover, increased costs imposed on telemarketers will eventually lead to increased costs for consumers in the form of higher prices for goods and services. Indeed, one of the reasons cited by the Commission for declining to adopt a national DNC list in 1992, was the significant costs associated with the maintenance and administration of such a list and the concern that these costs would ultimately be passed on to consumers. TCPA Rules and Regulations, 7 F.C.C.R. 8752 ¶ 14 (noting that the

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effectively administered by the DMA for over fifteen years, is well-funded and applies to a broad range of telemarketing calls. All DMA members are required to scrub their calling lists against the TPS and the DMA has estimated that this accounts for eighty percent (80%) of the telemarketing market. See comments filed by the DMA in connection with the FTC's NPRM regarding revisions to the Telemarketing Sales Rule, 67 F.R. 4492 (January 30, 2002), (the "FTC NPRM").

[2] The Commission determined a full decade ago that the costs associated with creating and maintaining a national DNC list were likely to exceed twenty million dollars ($20,000,000) in the first year alone and an additional twenty million dollars ($20,000,000) thereafter. TCPA Rules

greater the cost of compliance for small telemarketing entities, the more likely that such costs will be passed on to consumers). In addition, any costs passed on to consumers in the form of higher prices would unfairly apply to all consumers – including those who choose not to appear on the national DNC list. The ERA does not believe that these consumers should be required to subsidize another person's appearance on a national DNC list.

In light of the foregoing, the ERA believes that the company specific DNC list requirement contained in the Current TCPA Rule strikes a proper balance between the desire of consumers to limit certain unwanted telephone solicitations (but still receive desirable ones) and the needs of marketers to effectively and efficiently contact existing and prospective customers via the telephone marketing channel. See Board of Trustees v. Fox, 492 U.S. 469, 476 (1989) (restrictions on commercial speech must be no more expansive than necessary to serve the government's interests); Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York, 447 U.S. 557 (1980).

Nevertheless, we do believe that one aspect of the company-specific DNC list requirement should be modified. Companies are currently required to maintain do not call requests on their internal lists for a period of ten (10) years. However, a significant portion of the population moves (and, often, changes phone numbers) each year. Indeed, fifteen percent (15%) of the population moved between 1999 and 2000 alone. U.S. Census Bureau, Mobility Status of the Population by Selected Characteristics: 1980 to 2000, Statistical Abstract of the United States: 2001. As such, we believe that the time period during which information must be retained on a company-specific DNC list should

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and Regulations, 7 F.C.C.R. 8752 ¶ 14. It is reasonable to assume that the cost of establishing and administering such a list today would at least equal, if not well exceed, these amounts.

be reduced from ten (10) to five (5) years, as older information is less likely to be accurate.

IV. Comment on the Merits of any Joint FCC/FTC National DNC List Should Be Deferred Until After the Final FTC Proposal is Released

As noted above, the ERA does not believe that a national DNC list is either required or appropriate. The ERA further believes that the Commission's request for comment regarding the feasibility of acting in conjunction with the FTC to jointly administer a national DNC system is premature.

As a preliminary matter, the ERA notes that the FTC appears to lack the statutory authority to establish a national DNC list. The FTC's ability to promulgate regulations with respect to telemarketing activities is limited to the authority delegated to it by Congress. Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988). Unlike the Commission, the FTC has not been expressly authorized by Congress to promulgate regulations calling for the establishment and operation of a national DNC list. Rather, the Telemarketing and Consumer Fraud and Abuse Prevention Act ("TCFPA") merely authorizes the FTC to prescribe rules prohibiting deceptive and abusive telemarketing acts or practices. See 15 U.S.C. § 6102. Had Congress intended for the FTC (in addition to the Commission) to have the authority to establish a national DNC list, it presumably would have provided such authority in the TCFPA, which was enacted after the TCPA. The absence of such authority suggests that the Commission, not the FTC, is the sole agency authorized by Congress to create and maintain a national DNC list and, thus, that the FTC's proposal exceeds the scope of its statutory mandate. See also H.R. Rep. No. 79-1980 (1946), reprinted in U.S. Gov't Administrative Procedure Act: Legislative History, S. Doc. No. 79-248, at 233, 274-75 (1946) ("[N]o agency may undertake directly

or indirectly to exercise the functions of some other agency. The section confines each agency to the jurisdiction delegated to it by law. . . .").

Moreover, the FTC has not yet adopted final rules with respect to the adoption of a national DNC list. It is difficult, therefore, to know (i) whether such rules will be adopted, and (ii) if they are, how the FTC's national DNC list would operate. As such, we would respectfully request the opportunity for further comment on the interplay between any Commission national DNC list and a FTC national DNC list -- if and when rules calling for the creation of such a list are adopted by the FTC. Nevertheless, as the Commission itself has observed, there appear to be some issues with the preliminary FTC proposal that suggest that a jointly-administered national DNC list would be infeasible.

The TCPA sets forth a number of specific requirements that it would have to satisfy in adopting a national database. These include (i) a prohibition against charging consumers for inclusion on the national DNC list: and (ii) a requirement that the database be designed to enable states to use it to administer or enforce state law. 47 U.S.C. § 227(c)(3). Unlike the Commission, the FTC would not bound by these TCPA requirements in promulgating rules calling for the creation of a national DNC list. As such, the FTC may well adopt a national DNC list which calls for the payment of a nominal registration fee by consumers for appearance on the DNC list.[3] Moreover, the current FTC proposal does not expressly provide for the use of the national database by the states to administer or enforce state law. As such, the Commission may well be

[3] In its comments to the FTC NPRM, the ERA -- along with many other industry members -- called for the imposition of such registration fees as we believe that such fees would more equitably balance the costs of maintaining the DNC list between telemarketers and those consumers who choose to appear on the list.

precluded by statute from adopting the national DNC list scheme ultimately adopted by the FTC.

In addition, the FTC has indicated that it plans to allow consumers to provide notice of their desire to be placed on a national DNC list via a dial-in system using interactive voice response technology to answer the call from the consumer coupled with automatic number identification ("ANI") technology to verify the telephone number from which the individual is dialing before adding that number to the list. See Notice of Proposed New Privacy Act System of Records, available at www.ftc.gov/os/2002/03/frnprivacyactdonot.htm.

The FTC's proposed use of ANI data to enroll consumers in a national DNC list is problematic in several respects. ANI data merely identifies the telephone number from which a call is made and there is no way to determine whether the person placing the call is, in fact, the authorized subscriber for the telephone number at issue. Moreover, a telephone subscriber's intent to be placed on a National DNC list cannot be inferred merely by the fact that a call to be placed on the list was made from his or her telephone. As such, any DNC list that allows consumers to register solely on the basis of ANI data is likely to be fraught with data integrity problems. In addition, the Commission has taken the position in connection with its Current TCPA Rules that telemarketers are not required to honor third party do not call requests. Reliance on ANI data, however, may lead exactly to this result.

Moreover, the FTC's proposal assumes that it will be able to match the ANI data to a particular consumer's name and telephone number. In fact, industry experience suggests that existing technology provides a match in less than half of all calls. In

addition, the transmission of ANI data to the call recipient is controlled by the telephone companies. Telephone companies in some regions of the country do not currently transfer ANI data. Thus, as a practical matter, consumers residing in these areas would be precluded from placing their names on the FTC's proposed national DNC list.

In light of the foregoing, and the general uncertainly regarding whether the FTC will promulgate rules calling for the creation of a national DNC list, we believe that the Commission should defer comment on the possible interaction with the FTC in this regard until such time as the FTC issues its final rules.

V. Any National DNC List Must Contain an Established Business Relationship Exemption

Notwithstanding the foregoing, in the event that the Commission does determine that a national DNC list is required, the ERA strongly believes that there must be an exemption for calls placed to consumers with whom the seller has an established business relationship.

As the Commission itself determined in its initial TCPA rulemaking, "a solicitation to someone with whom a prior business relationship exists does not adversely affect subscriber privacy interests." See NPRM, 67 F.R. at 62673. Moreover, the existence of an established business relationship is evidence of some level of interest on the part of the consumer in the seller's goods or services. Thus, it is reasonable to assume, at least at the outset, that the consumer may be interested in receiving a telephone solicitation from that seller. In the event that the consumer is not interested in receiving such a call, he or she still has the ability, even under the Current Rule, to request that the particular seller refrain from making telemarketing calls to the consumer in the future.

This approach is consistent with that taken previously by the Commission in connection with the transmission of unsolicited facsimile advertisements, in the proposed Can Spam Act with respect to the sending of unsolicited commercial e-mail advertisements, and by the majority of state and federal legislatures and agencies that have enacted statutes and regulations relating to the making of unsolicited telephone solicitation calls and the sending of unsolicited facsimile and e-mail advertisements. See e.g., 47 U.S.C. § 227(a)(3); S. 630, 107th Cong. § 3 (2001). For example, the vast majority of states that have enacted DNC list legislation recognize some form of prior or existing business relationship exemption. See e.g., Ky. Rev. Stat. Ann. § 367.46951; Minn. Stat. Ann. § 325E.311; Okla. Stat. Ann. tit. 15, § 775B.2(3); 73 Pa. Cons. Stat. Ann. § 2242.

We note that the alternative proffered by the FTC in connection with its national DNC list proposal – allowing consumers to "opt-in" to receive calls from particular sellers – is impractical. It is simply unrealistic to believe that a consumer would take the time and effort (or even be able) to identify each marketer from which he or she would be willing to receive a telemarketing call. In contrast, an established business relationship exemption, coupled with the company specific DNC requirement of the Current TCPA Rule, would represent a reasonable compromise and balancing of consumer expectations and the needs of businesses to contact their customers. Consumers placing their names on the national DNC list would be able, in the first instance, to prevent all commercial telemarketing calls other than those from parties with which they have established business relationships. In the event that a consumer subsequently determines that he or she does not wish to receive telemarketing calls from one of these entities, the consumer

need only notify the company of that fact that either prior to or upon receipt of a telemarketing call. Thus, under the worst case scenario, a consumer need only receive a single telemarketing call from a particular seller with which it has an established relationship in order to prevent the receipt of future solicitation calls from that company.

Finally, we believe that the following would be an appropriate definition of an established business relationship:

> A "prior business relationship" shall exist when within the 24 month period prior to the outbound telephone call there has been a business transaction between the seller and the consumer, including: (1) a purchase transaction, (2) a transaction involving the provision, free of charge, of information, goods or services requested by the consumer, (3) the acceptance of an incentive by the consumer, or (4) the participation in a promotion by the consumer, and the relationship ha s not been previously terminated by either party.

It should be noted that we believe this definition to be broad enough to encompass continuity programs and other business transactions in which previously paid for products or services are provided to consumers during the relevant 24 month period.

VI. Any National DNC List Should Preempt or be Harmonized With State DNC Lists

The Commission has also requested comment on the potential relationship of any national DNC list to the various state DNC lists now in effect. In particular, the Commission has asked whether those states with DNC lists have the authority to enforce their list requirements against interstate telemarketing calls or, alternatively, whether such lists should apply only to intrastate calls with interstate calls governed by federal law.

The ERA does not believe that the states have the legal authority to enforce their state-based DNC list requirements against interstate telemarketing calls. Under the Supremacy Clause of Article VI of the United States Constitution, a state may not

regulate conduct in an area of interstate commerce intended by the Congress for exclusive federal regulation. The key inquiry is whether Congress intended to supplant state laws on the same subject. In the matter of Operator Services Providers of America Petition for Expedited Declaratory Ruling, 6 F.C.C. 4475, 4476 (1991).

In this case, the Communications Act grants the Commission jurisdiction over all interstate and foreign communications and generally reserves to the states jurisdiction over intrastate communications. 47 U.S.C. §§ 152(a), 153(22). Moreover, the TCPA establishes Congress's intent to provide for exclusive regulation by the Commission of interstate telephone solicitation calls while expressly reserving for the states the right to impose more restrictive requirements on intrastate telephone solicitations. See 47 U.S.C. § 227(e)(1); January 26, 1998 letter from Geraldine A. Matise, Federal Communications Commission Common Carrier Bureau to Delegate Ronald Guns, Maryland House of Delegates. As such, the ERA believes that the jurisdiction of the state-based DNC lists is legally limited to intrastate calls.

Currently, twenty-seven (27) states have enacted DNC list statutes.[4] These statutes have different enforcement standards and varying requirements with respect to the frequency with which their lists are published and updated, the manner in which telemarketers can obtain the lists and the applicability of their DNC requirements to particular entities or transactions. The administrative costs associated with attempting to comply with these myriad state requirements is enormous. In light of the proliferation of do not call list legislation over the past few years, these costs are likely to continue to

[4]Alabama, Alaska, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Minnesota, Missouri, New York, Oklahoma, Oregon, Pennsylvania, Tennessee, Texas, Vermont, Wisconsin and Wyoming.

grow exponentially and telemarketers could shortly face the prospect of having to comply with fifty-one (51) separate state do not call lists (including the District of Columbia).

As the Commission itself noted in the NPRM, the state Attorneys General take the position that they have the authority to (and, indeed, actively attempt to) enforce their DNC list and other telemarketing requirements against interstate calls. In light of this enforcement climate, many responsible marketers, including our members, have taken an extra-conservative approach and implemented compliance programs that assume that state-based DNC lists apply to interstate as well as intrastate calls -- even though, as noted above, we do not believe that such an approach is required as a matter of law.

The Commission has suggested that "a national [DNC] list might provide consumers with a one-step method for preventing telemarketing calls." NPRM, 67 F.R. at 62675. The Commission has also suggested that "a national list might also be less burdensome for telemarketers, who, under the company-specific approach, must retain do-not-call records for a period of ten years." Id. However, without preemption, or some other harmonization of the myriad different requirements, exemptions, enforcement mechanisms and other legal requirements contained within the various state DNC schemes, these perceived efficiencies or benefits will not be achieved.

Without preemption, telemarketers would be faced with the extraordinary burden of having to comply not only with a national DNC list, but with an ever-growing number of state lists. Rather than creating efficiencies, a national DNC list that does not provide for preemption would simply add to this administrative burden by becoming yet another list with which telemarketers would be required to comply. Moreover, without any express preemption of state-maintained lists consumers are likely to be confused with

respect to the lists to which they should add their names. Differences between the national DNC list and the various state lists, for example with respect to statutory exemptions, are also likely to lead to consumer confusion and dissatisfaction.

The ERA believes that a workable preemption/harmonization scheme would involve the incorporation of state-maintained DNC lists into the national DNC list, with uniform federal exemptions, safe harbors and regulations applicable to all interstate telemarketing calls. States with more or less restrictive requirements and enforcement schemes would remain able to apply those standards to intrastate calls conducted within their states and would also have the ability to enforce the national DNC list and federal standards with respect to interstate calls made into or out of their states.

VII. The Commission Should Not Mandate an Abandonment Rate for the Use of Predictive Dialers Below the Current Industry Standard of Five Percent (5%)

The Commission seeks comment regarding whether it should adopt regulations restricting the use of predictive dialers and, in particular, whether it should set a maximum abandonment rate for calls placed via predictive dialer.

Predictive dialers afford telemarketers significant efficiencies in terms of operator productivity by automatically dialing the consumer's telephone number at a rate designed to minimize operator down time and maximize the number of consumers that a particular operator can speak with during a specific time period. The ERA acknowledges, however, that these efficiencies must be balanced against consumer objections to abandoned calls.[5] As such, we believe that telemarketers should utilize the lowest

[5] While cognizant of these consumer objections, the ERA does not believe that calls placed via predictive dialers are any more intrusive or invasive of consumer privacy than those placed manually. Calls can be "abandoned" (i.e., disconnected prior to the caller ever initiating a conversation with the called person) when placed manually as well as when placed via predictive dialer.

possible abandonment rate commensurate with effective and cost efficient marketing, and support the five percent (5%) abandonment rate contained within the DMA's self-regulatory guidelines. The ERA is opposed, however, to any regulation which would prohibit the use of predictive dialers or mandate a more onerous abandonment rate.

A mandatory abandonment rate below five percent would have a negative impact on telemarketers that would far outweigh any benefit to consumers. Outbound telemarketers are typically compensated on the basis of the number of calls placed, or orders generated, during a particular time period (an hour, day, etc.). Compliance with a lower abandonment rate (to the extent technologically feasible) would result in fewer calls being placed during the relevant time period and, thus, directly reduce the revenues earned by telemarketers.

In addition, a lower mandatory abandonment rate could add significant costs to telemarketers. Those telemarketers with older predictive dialer equipment may well lack the technological capability of achieving the lower abandonment rate and, as such, could face the prospect of having to incur significant capital expenditures to upgrade their predictive dialers. For smaller telemarketers, with more limited financial resources, the cost of these upgrades could be prohibitive. These smaller companies would essentially be forced to cease using predictive dialers, which would drastically reduce their operator productivity and place them at a distinct competitive disadvantage with respect to larger call center operations that are better able to absorb the increased cost associated with ensuring compliance with a lower abandonment rate. Ultimately, this could result in many smaller telemarketers going out of business and a significant loss of jobs.[6]

[6]The telemarketing industry employs an estimated 415,000 workers and impacts upon an additional 4.1 million jobs. Economic Impact: U.S. Direct Marketing Today 2002, commissioned

Therefore, to the extent that the Commission feels compelled to mandate an acceptable abandonment rate, the ERA would strongly urge that it consider a standard of five (5%) percent, which is consistent with the DMA's current self-regulatory standard.

In addition, consideration must be given to the time period over which the abandonment rate will be measured and the definition of an abandoned call. Abandonment rates will vary significantly based on the time of the call, type of campaign, number of operators available, number of telephone lines employed by the call center and other factors. As such, any measurement of abandonment rates must be over a sufficiently long period of time (e.g., monthly) to account for these short-term fluctuations. Moreover, the term "abandoned" must be defined narrowly to ensure that it encompasses only those situations where a call is connected to a consumer and then disconnected by the predictive dialer because an operator was unavailable to be connected to the call. For example, instances where the consumer hangs up before the operator begins his or her contact (but has been connected and is available for the call), or where the operator is connected but disconnects the call because there is no response from the consumer or the consumer's response is inaudible, should not constitute abandoned calls.

VIII. Conclusion

The ERA believes that a national DNC list is unnecessary and more restrictive of telemarketer's ability to communication with actual and potential customers than required to protect the privacy interests of consumers. In contrast, we believe that the Commission's current company-specific DNC list requirements strikes the proper

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by the Direct Marketing Association, conducted by DRI/WEFA. Clearly, the number of workers that could potentially be impacted by such a requirement is significant.

balance between the desire of consumers to prevent unwanted telephone solicitations and the needs of business to contact their customers and potential customers.

We further believe that any comment on the possible coordination of efforts between the Commission and the FTC in connection with the adoption of a national DNC list is premature. The FTC has not yet promulgated final rules calling for the creation of such a national list and has provided only the barest minimum of details regarding how such a list would be operated. As such, we would respectfully request the opportunity to comment further on this issue in the event the final rules relating to a national DNC list are adopted by the FTC.

Finally, the ERA does not believe that the Commission should impose a mandatory abandonment rate on calls placed via predictive dialer below the current industry standard of five percent (5%).

Respectfully Submitted:

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